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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1342

ALLEN KLEIN

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Allen Klein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1979.

Opinions Below

The opinion of the Court of Appeals (1a)[1] affirming the judgment of conviction is not officially reported. The opinion of the United States District Court (5a) denying Klein's motion for entry of a judgment N.O.V. or, in the alternative, a new trial, is reported at 474 F. Supp. 1243 (S.D.N.Y. 1979).

[1] Citations bearing the suffix "a" refer to pages of the Appendix to this Petition; citations bearing the prefix "JA" refer to pages of the Joint Appendix, filed in the United States Court of Appeals for the Second Circuit, which will be filed as part of the certified record of this Court.

Jurisdiction

This Petition for a writ of certiorari is filed within 30 days of the denial by the Court of Appeals (3a-4a) on January 31, 1980 of Klein's timely petition for rehearing, and suggestion for rehearing in banc, of the initial judgment of the Court of Appeals which had been entered on December 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where a defendant's timely pre-trial motion to dismiss multiplicitous counts was denied, and the trial ended in a hung jury,

A. must defendant's counsel repeat the very same motion prior to the second trial in order to preserve that objection for appellate review; and

B. can the defendant be held, without an evidentiary hearing, to have impliedly waived that objection and his right to appellate review of the denial of that motion, solely because defense counsel refrained from remaking that motion before the second trial judge and submitted relevant jury instructions?

2. A. Does a prior misdemeanor conviction for non-filing of withholding tax returns fit within the limited category of convictions involving "dishonesty or false statement" which are admissible under rule 609(a)(2), F.R.Ev.?

B. Where the essential elements of a prior misdemeanor conviction do not require proof of dishonesty or false statement, can it be held admissible to impeach the defendant under rule 609(a)(2), F.R.Ev., which limits admissibility to those misdemeanors involving "dishonesty or false statement," on the court's determination that, although the jury returning that conviction did not expressly so state, the conviction rested on some evidence of dishonesty or false statement?

3. Is it proper for the prosecutor to introduce evidence of other tax-related misconduct of the defendant, not resulting in a conviction, and not relevant to the tax charges in the indictment?

Statutes and Rules Involved

Sections 7201, 7203 and 7206 of Title 26, United States Code, rule 12(a), (b), (e), and (f) of the Federal Rules of Criminal Procedure, and rules 404 and 609(a) of the Federal Rules of Evidence, which are involved, are set out verbatim in the Appendix, *infra,* pp. 17a-20a.

Statement of the Case

The Indictment and Verdict

The indictment (JA18-23) against Klein contained three counts of attempting to evade the payment of his income taxes for 1970, 1971, and 1972 respectively, in violation of 26 U.S.C. § 7201, and three counts of filing false income tax returns for the same three years, in violation of 26 U.S.C. § 7206. All six counts were based exclusively on the charge that Klein had failed to report, on his income tax returns, cash he allegedly received from the sale of promotional phonograph records. The first trial ended in a mistrial when the jury was dismissed as deadlocked over Klein's objection. The retrial jury, after 17½ hours of deliberations, found Klein not guilty on all three tax evasion charges and on the 1971 and 1972 false filing charges, and guilty only on the 1970 false filing charge.

Summary of Both Parties' Theories

The government's theory was that Peter Bennett, an employee of ABKCO Industries, Inc. ("ABKCO"), the public company of which Klein is President,[2] gave Klein most of the proceeds from promotional records sold by Bennett on Klein's instructions. Klein did not dispute Bennett's confession that, in 1970, 1971 and 1972, Bennett sold promotional records which he obtained in his capacity as National Promotion Man of

[2] During all relevant times, Klein's company was the business manager of the Beatles and the Rolling Stones, two popular singing groups.

ABKCO. There was also no dispute that neither Bennett nor Klein reported any of the proceeds from these sales on his respective income tax returns for those three years, and that, if reported, the income would have resulted in substantial additional tax liability.

Klein's defense was that Bennett had, without Klein's knowledge, sold these records (which he was supposed to give away for promotional purposes), and retained all proceeds for himself.

The Single Crucial Factual Issue On All Six Counts

The district court instructed the jury on all six counts that "[t]he essential factual issue that is presented is whether Mr. Bennett gave Mr. Klein proceeds from the sale of promotional records" (JA1482, 1489-90, 1503). The determination of this single crucial issue turned on credibility: did the jury believe the testimony of the government witness Bennett who, when his sales of promotional records became known to the government, pointed a finger at Klein as the person for whom he was selling the records and to whom he gave the proceeds; or did the jury believe Klein who denied any complicity in or receipt of proceeds from Bennett's sales?

The Court's Denial of Klein's Pre-Trial Motion To Dismiss Multiplicitous Counts

Klein had timely moved, as part of his pre-trial motion, pursuant to rule 12, F.R.Crim.P., to dismiss the false filing counts (including count 4, the only one on which Klein was convicted), as lesser included offenses, multiplicitous of the tax evasion counts, relying, *inter alia,* on *United States* v. *Harary,* 457 F.2d 471 (2d Cir. 1972) [JA 2060-62, 2072(10)-2072(11), 2072(40)-2072(41)]. That motion was unconditionally denied by Judge Metzner (to whom the case was assigned for pre-trial purposes, and who presided at the first trial) [JA2072(52)]. As there were no changed circumstances, the motion was not

remade before Judge Broderick (the second trial judge), because of the law-of-case doctrine's strong "cautionary admonition" to attorneys against remaking denied motions. *Dictograph Products Co.* v. *Sonotone Corp.,* 230 F.2d 131, 134 (2d Cir.), *cert. dismissed,* 352 U.S. 883 (1956). Nevertheless, Klein's counsel reiterated to Judge Broderick that the determinative issue on the false filing counts remained identical to the determinative issue on the tax evasion counts (JA1311-13). Pursuant to Klein's request, the jury was so instructed on all counts, including the multiplicitous counts which the court had refused to dismiss (see p. 4 *supra*).

Klein's Post-Verdict Motion

Klein unsuccessfully moved, following the jury verdict, for entry of a judgment N.O.V. or, in the alternative, for a new trial, on the following grounds, among others:

1. As the district court had expressly instructed the jury, the *only* controverted issue on both count 1, charging tax evasion for 1970, and count 4, the lesser included offense charging false filing for 1970, was the same: whether Bennett gave promotional record sale proceeds to Klein. Hence, the guilty verdict on count 4 was inconsistent with the acquittal on count 1. The Court of Appeals had expressly held in *United States* v. *Harary, supra,* that such inconsistent verdict on a lesser included offense must be set aside, where the defendant had made a timely pre-trial motion to dismiss the multiplicitous lesser included offense—just what Klein had done here.

2. The prosecutor had been permitted improperly to prejudice the jury by painting Klein as a generally immoral person and repeater tax cheat, by evidence of, *inter alia,* (a) an inadmissible prior misdemeanor conviction of Klein for failing to file withholding tax returns; and (b) tax-related misconduct not resulting in his conviction of a crime.

Reasons For Granting The Writ

A. Concerning Klein's Alleged Waiver Of His Multiplicity Objections

1. The Court below erroneously held that defense counsel effected a waiver of Klein's multiplicity objection, by not reasserting before a second district judge the identical pre-trial motion made to and denied unconditionally by the district judge to whom the case was initially assigned. As shown *infra* (pp 8-15), this holding (i) seriously hinders the efficient administration of criminal justice by emasculating the law-of-the-case doctrine's admonition against remaking already denied motions and by requiring defense counsel to reassert such motions and objections in order to preserve the defendant's fundamental right to appellate review thereof; and (ii) conflicts with a Fifth Circuit decision (p. 10 *infra*) that renewal before a second district judge is not required to preserve a defendant's objection asserted in his pre-trial motion, and with the principles established by the decisions of several circuits (pp. 11-12 *infra*) that the law-of-the-case rule furthers the desirable public policy of fair and efficient expedition of the lawsuit. Further, this issue raises an important and recurring question of the construction of rule 12, F.R.Crim.P.—which provides that such multiplicity objection must be asserted in a single pre-trial motion and that a waiver is effected if it is not made as part of the pre-trial motion—which should be decided by this Court.

2. The Court below held that defense counsel's waiver of Klein's multiplicity objection was also evidenced by the submission and discussion of proposed jury instructions on the multiplicitous counts which he had unsuccessfully moved to dismiss. As discussed *infra* (p. 13), this holding is erroneous and would effect a serious hindrance to the efficient administration of criminal justice in the United States, by penalizing a defendant for his counsel's fulfilling the professional obligation to furnish proposed jury instructions. Moreover, this holding conflicts with the principle enunciated in decisions of several circuits (p. 13 *infra*) that a trial court's rejection of the

defendant's legal contention does not excuse defense counsel's failure to submit a proposed jury instruction on that subject.

3. In holding, without any evidentiary hearing, that defense counsel's conduct constituted an implied waiver of Klein's multiplicity objection, the decision below conflicts with decisions of this Court that a waiver requires an intentional relinquishment of a known right (p. 14 *infra*), and that an evidentiary hearing is required before a defendant can be held to have waived such an objection on the basis of his counsel's conduct (p. 14 *infra*).

B. Concerning The Evidence Of Klein's Prior Misdemeanor Conviction

1. The holding of the Court of Appeals that the prosecutor properly was permitted, on cross-examination of Klein, to adduce evidence of Klein's misdemeanor conviction for non-filing of withholding tax returns, is erroneous, and conflicts in principle with the decisions of the Third, Eighth, and District of Columbia Circuits, and another panel of the Second Circuit (pp. 16-17 *infra*). These decisions hold that, to be admissible for impeachment purposes under rule 609(a)(2), F.R.Ev., a prior misdemeanor conviction must involve a dishonest communication or conspiracy for that purpose—factors which bear directly on the likelihood that the defendant will testify truthfully—and not be a crime committed by stealth or nonaction. Moreover, the decision below raises a recurring question, important to the administration of criminal justice, of the construction of F.R.Ev. 609(a)(2) and the limitation imposed by that rule on the admissibility of a prior misdemeanor conviction—a question which has not been but should be settled by this Court.

2. The holding that Klein's prior misdemeanor conviction for non-filing of withholding tax returns involved fraud, and thus was admissible for impeachment purposes, is erroneous and conflicts with decisions of this Court and of the First and Ninth Circuits (p. 18 *infra*), which hold that the crime of non-

filing does not require an intent to deceive or defraud. Moreover, the Court below sanctioned the district court's basing its finding that the non-filing conviction involved fraud, not on the elements of that crime, but on counsel's statements as to the evidence on which the jury relied in voting the prior non-filing conviction. In so holding, the Court below misconstrued rule 609(a)(2), F.R.Ev., and thereby raised a recurring question, important in the administration of criminal justice, concerning the procedure for determining admissibility of a defendant's prior misdemeanor convictions.

C. Concerning The Evidence Of Other Acts Of Misconduct by Klein

The holding of the Courts below that the prosecutor could properly seek to paint the defendant as a generally bad and dishonest person, by adducing evidence, both extrinsically and in cross-examining the defendant, that he engaged in other tax-related misconduct, not resulting in the conviction of a crime, is erroneous, conflicts with decisions of several circuits (p. 21 *infra*) that such evidence is inadmissible, and so far sanctions a departure from the accepted and usual course of criminal proceedings—excluding inherently prejudicial evidence of an accused's prior uncharged crimes or wrongs—as to call for an exercise of this Court's supervisory powers.

I

The Holding By The Courts Below That Klein's Multiplicity Objection Was Not Preserved For Appellate Review, Despite Its Assertion As Part Of His Rule 12 Pre-Trial Motion Which Was Unconditionally Denied By The District Court, On The Ground That It Had Been Impliedly Waived By Defense Counsel's Failure To Remake The Motion Before A Succeeding District Judge And Defense Counsel's Submission Of Proposed Jury Instructions, Conflicts With Prior Decisions Of This Court And Of Several Circuits

Neither Court below disputed Klein's position that

(i) count 4, charging the filing of a false income tax return for 1970, on which Klein was convicted, was a multiplicitous lesser offense included in count 1, charging tax evasion for 1970, on which Klein was acquitted; and

(ii) on the authority of *United States* v. *Harary, supra,* the guilty verdict on count 4 would have been set aside if Klein's pre-trial motion to dismiss count 4 were considered to have been timely made.

Instead, the Courts below held that Klein had waived his multiplicity objection by (i) not remaking in the second trial his motion to dismiss count 4, which had been denied prior to the first trial, and (ii) offering and discussing proposed jury instructions on that count which, as it had not been dismissed, was to be submitted to the jury.

That holding was erroneous and, if undisturbed by this Court, would have serious implications (hereinafter discussed) for the administration of criminal justice.

A. The Denial Of A Defendant's Fundamental Right To Appellate Review

As this Court has held, the denial of a motion to dismiss can only "be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Abney* v. *United States,* 431 U.S. 651, 663 (1977). Hence, Klein could not appeal the district court's denial of his pre-trial motion to dismiss count 4 until after he was convicted on that count in the second trial. Yet, when he sought the very review to which he was entitled, the Court below held that Klein was barred from exercising his fundamental right to appellate review [*Coppedge* v. *United States,* 369 U.S. 438, 441 (1962)] because he had failed to remake in the second trial the pre-trial motion previously denied by the district court.

This holding ignores the provisions of rule 12, F.R.Crim.P., and is directly contrary to a decision of the Fifth Circuit.

Rule 12, F.R.Crim.P., requires that all objections to any indictment defect be made prior to trial "in a *single* motion" [Notes of Advisory Committee to subdivisions (b)(1) and (2); emphasis added] and only by a motion to dismiss [rule 12(a)]. Further, the only ground specified in the rule for holding that a defendant has waived such objection is his failure to include such objection in a single motion to dismiss before trial [12(f)]. Finally, subdivision (e) provides that, absent express provision to the contrary by the court, such pre-trial motion to dismiss "shall be determined before trial." This combination of provisions in rule 12 has been interpreted to mean that "[i]f a motion is denied before trial it is ordinarily not necessary to renew it at the trial in order to preserve the point on appeal." 8 *Moore's Federal Practice* ¶ 12.04, at p. 12-28 (2d ed. 1979).

Consistent with that construction of rule 12, the Fifth Circuit, in *United States* v. *Bova,* 493 F.2d 33, 37 (5th Cir. 1974), rejected the government's argument there that the defendant waived an objection made in a pre-trial motion, and denied by the district court, where he failed to renew that motion before the succeeding district judge who was to preside at the trial. While noting that the defendant had the option to renew his already denied motion before the second district judge, the Fifth Circuit held that he sufficiently protected his objection by making the motion before trial, and "[r]enewal is not necessary to preserve the adverse ruling for appellate review."

Directly contrary to that holding, the Court below held that Klein's failure to renew before Judge Broderick his pre-trial motion to dismiss count 4 as multiplicitous, which had been denied by Judge Metzner, constituted a waiver of that objection which precluded appellate review of the merits of Klein's multiplicity objection.

B. The Emasculation Of The Law-Of-The-Case Doctrine

The law-of-the-case doctrine, essential to judicial economy and expedition in its avoidance of needless repetition of non-

evidentiary[3] issues once decided, has been unanimously recognized, until the decision below, as an *admonition* to counsel not to reopen such issues. *E.g., Stevenson* v. *Four Winds Travel, Inc.,* 462 F.2d 899, 904-05 (5th Cir. 1972); *Plattner Implement Co.* v. *International Harvester Co.,* 133 Fed. 376, 378-79 (8th Cir. 1904); *United States* v. *Waldin,* 149 F. Supp. 912, 914 (E.D. Pa. 1957), *aff'd,* 253 F.2d 551 (3d Cir.), *cert. denied,* 356 U.S. 973 (1958). The doctrine has even been held applicable in a subsequent litigation between the same parties. *Antonioli* v. *Lehigh Coal & Navigation Co.,* 451 F.2d 1171, 1178 (3d Cir. 1971), *cert. denied,* 406 U.S. 906 (1972). Indeed, observance of this rule required one district court to castigate counsel for remaking a motion previously denied by another judge:

> "Hence the present motion *should not have been made.* In effect it seeks to have me review the order of another judge of this court. *I can lend no encouragement to such a practice.* If tolerated it would inevitably lead to hopeless confusion and embarrassment in the administration of justice in this court." *Hearst Radio, Inc.* v. *Federal Communications Commission,* 73 F. Supp. 308, 309 (D.D.C. 1947), *aff'd,* 167 F.2d 225 (D.C. Cir. 1948) (emphasis added).

Prior to the instant decision, the Second Circuit had also instructed district courts and counsel to abide by the law-of-the-case rule's strong "cautionary admonition" against remaking an already denied motion. *Dictograph Products Co.* v. *Sonotone Corp., supra,* 230 F.2d at 134. And in *United States* v. *Dooling,* 406 F.2d 192, 197 (2d Cir.), *cert. denied sub nom. Persico* v.

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[3] The law-of-the-case doctrine is not applicable to decisions on the admissibility of evidence. Indeed, an objection to evidence is *required* to be made *at each trial* when the evidence is offered, or it is deemed to be waived, as that decision must be made in light of "the circumstances of the trial itself." *Leroy* v. *Sabena Belgian World Airlines,* 344 F.2d 266, 274 (2d Cir.), *cert. denied,* 382 U.S. 878 (1965); *United States* v. *Mangan,* 575 F.2d 32 (2d Cir.), *cert. denied,* 439 U.S. 931 (1978); *United States* v. *Dovico,* 261 F. Supp. 862, 869 (S.D.N.Y. 1966), *aff'd,* 380 F.2d 325 (2d Cir.), *cert. denied,* 389 U.S. 944 (1967).

United States, 395 U.S. 911 (1969), the Second Circuit issued a writ of mandamus to prevent the trial judge from dismissing an indictment, after the identical motion had been denied before trial, with leave to renew under specified conditions; the Circuit Court stated that absent these conditions, the motion had been " 'determined before trial,' and could not thereafter be entertained by a district judge without doing violence to the interests of judicial economy furthered by Rule 12(b)(2) and (4)."

Recently the District of Columbia Court of Appeals emphasized the importance of the law-of-the-case doctrine in holding that a second trial judge correctly refused to hear a motion to suppress denied by another trial judge, even though the indictment had been dismissed and a new one filed since the first denial of that motion. *Smith* v. *United States,* 406 A.2d 1262 (D.C. Ct. App. 1979).

The Courts below here, however, gave no effect to the law-of-the-case doctrine, in their holding that, to protect his multiplicity objection, Klein was required to remake, before the second trial judge, his pre-trial motion to dismiss which had been unconditionally denied by another trial judge. This decision, if left undisturbed, will require counsel to repeat, at all stages of a litigation, motions previously denied by the district court, in order to insure that he will not be held to have waived his objection—a massive waste of judicial time and energy contrary to the repeated express judicial instructions against counsel's repetition of already decided motions.

C. Penalizing A Defendant For His Counsel's Adherence To Rules Governing Proper Professional Conduct

Recognizing that Klein never expressly and deliberately waived his multiplicity objection, the Court below rested its decision on an *implied* waiver, found in defense counsel's having "engaged in a course of conduct that indicated his agreement that the false filing counts should go to the jury along with the evasion counts" (2a). That "course of conduct" was limited to counsel's failure to renew before the second trial

court petitioner's already denied motion to dismiss, and counsel's submission and discussion of proposed jury instructions on the multiplicitous counts.

These acts, found to constitute an implied waiver, were, in actuality, counsel's compliance with standards of professional conduct. Thus, as discussed above, counsel's refraining from remaking the denied motion to dismiss was professionally required in view of the law-of-the-case admonition against remaking, before a second district judge, a motion already denied by another district judge.

Likewise, in submitting and discussing proposed jury instructions on the multiplicitous counts—which were being submitted to the jury for its verdict—counsel was only fulfilling his professional obligation to propose jury instructions on every undismissed count. The *ABA Standards, Trial by Jury* § 4.6 (1968), expressly imposed on defense counsel the obligation of being "responsible for insuring that the jury is adequately instructed." This obligation has been underscored by decisions of several circuits that a trial court's rejection of a defendant's legal contention does not excuse defense counsel's failure to submit a proposed jury instruction on that subject. *E.g., United States* v. *Sciolino,* 505 F.2d 586 (2d Cir. 1974); *United States* v. *Pitman,* 475 F.2d 1335 (9th Cir.), *cert. denied,* 414 U.S. 873 (1973); *United States* v. *Rouse,* 452 F.2d 311 (5th Cir. 1971); *United States* v. *Frazier,* 385 F.2d 901 (6th Cir. 1967).

In ignoring these professional obligations of counsel, the Court below has imposed on counsel in all future cases an untenable Scylla/Charybdis choice between compliance with professional obligations which effect a waiver of the defendant's objections *or* violation of those obligations, thereby preserving objections for appellate review.

D. Depriving A Defendant Of An Evidentiary Hearing On Waiver By Counsel's Conduct

In finding that defense counsel's conduct constituted an implied waiver by the defendant, the Courts below are in conflict with this Court's holding that a waiver can only be found if there has been an "*intentional* relinquishment . . . of the known right." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938) (emphasis added).

Further, in making a factual finding, without an evidentiary hearing, that defense counsel, by his course of conduct, intended to indicate his waiver of the multiplicity objection, the Courts below were in conflict with repeated holdings of this Court that:

> "An evidentiary hearing will ordinarily be required before the District Court can determine whether petitioner made a deliberate strategic waiver of his claim . . . to determine (1) the reason for counsel's failure . . . to take further action. . . ." *Humphrey* v. *Cady,* 405 U.S. 504, 517 (1972).

An evidentiary hearing is necessary because "[o]nly evidence extrinsic to the record . . . can establish the fact of waiver" based on counsel's conduct. *Henry* v. *Mississippi,* 379 U.S. 443, 452 (1965). For, "[i]n the absence of a showing that [counsel's conduct] was promoted by litigation strategy, the present record is insufficient to support such a holding." *Id.* at 451n.7.

An evidentiary hearing was particularly required here in view of the already apparent circumstances negating a conclusion that Klein's counsel's conduct was based on a deliberate strategic waiver of Klein's claim. As discussed *supra,* both the law-of-the-case admonition against remaking denied motions and counsel's duty to submit requests to charge suggest that counsel was motivated by professional obligations. This conclusion is underscored by the fact that the identical requests to charge on the false filing counts, on which Judge Broderick

relied as indicating an intent to abandon the objection, had been submitted for use in the first trial, after Judge Metzner had denied Klein's motion to dismiss, but even before commencement of that first trial. And Klein's counsel expressly advised Judge Broderick that he remained of the view that the determinative issue on the false filing counts was identical to the determinative issue on the tax evasion counts (JA1311-13). Defense counsel's conduct in not remaking the motion to dismiss thus cannot be held, without an evidentiary hearing, to have effected a waiver on behalf of Klein.

II

The Sanctioning By The Courts Below Of The Prosecutorial Tactic of Painting The Defendant As A Generally Bad Person And Repeater Tax Cheat, By Evidence Of A Prior Misdemeanor Conviction For Non-Filing Tax Returns And Of Various Acts Of Misconduct Not Resulting In A Conviction, Raises Important And Recurring Questions Of The Construction Of F.R.Ev. 609 And 404, And Conflicts With Decisions Of Various Circuits

The Courts below sanctioned tactics by the prosecutor, through questions he posed and testimony he elicited (hereinafter discussed), which painted Klein as a generally immoral person and repeater tax cheat. The decisions below, which rejected the rule that the jury verdict must be based on evidence relevant to the charges, and "not [be] because the jury may believe the defendant to be a person of bad character or because he committed a similar offense," *United States* v. *Taglione,* 546 F.2d 194, 199 (5th Cir. 1977), conflict with principles enunciated by this Court and decisions of several circuits. In thus allowing the prosecutor to obtain a conviction by catering to, as Wigmore put it,

> "The deep tendency of human nature to punish, not because our [defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, [which] is a tendency which cannot fail to operate with any jury, in or out of Court," 1 Wigmore, *Evidence* § 57, at 456 (3d ed. 1940),

the courts below permitted such a departure from the accepted and usual course of criminal proceedings as to call for the exercise of this Court's supervisory power to insure the proper administration of criminal justice.

A. Evidence Of Prior Non-Filing Misdemeanor Conviction

1. Misdemeanor Conviction For Non-Filing Of Withholding Tax Returns Does Not Fit Within Rule 609 Limitation That Only Convictions Involving Dishonesty Or False Statement Are Admissible—Over Klein's objection, the trial court permitted the prosecutor, in cross-examination of Klein, to adduce evidence of a 1971 misdemeanor conviction, under 26 U.S.C. § 7203, for wilfully failing to make and file returns for the withholding of taxes by his company (then a partnership) from its employees for portions of the period January 1960 through July 1962 (JA1068-72). This misdemeanor conviction could be admissible only if the § 7203 crime "involved dishonesty or false statement" [rule 609(a)(2), F.R.Ev.], a term defined as any

> "offense *in the nature of crimen falsi,* the commission of which involves some *element* of deceit, untruthfulness, or falsification *bearing on the accused's propensity to testify truthfully.*" Conf. Rep. No. 93-1597, Dec. 14, 1974, reprinted in [1974] U.S. Code Cong. & Ad. News at 7103 (emphasis added).

The term *crimen falsi,* used in that definition, has itself been limited to "crimes involving, or at least relating to, *communicative,* often verbal, *dishonesty.*" *Government of Virgin Islands* v. *Toto,* 529 F.2d 278, 281 (3d Cir. 1976) (emphasis added). The examples of *crimen falsi* offenses given by the Court of Appeals for the District of Columbia Circuit, in *United States* v. *Smith,* 551 F.2d 348, 363n.26 (D.C. Cir. 1976), similarly involve affirmative communications of dishonesty or conspiracy for such purpose.

Consistent with that limitation of *crimen falsi,* courts have held inadmissible, as not involving dishonesty or false statement, prior convictions for attempted robbery [*United States* v. *Smith, supra*], petit larceny [*Government of Virgin Islands* v. *Toto, supra*], assault and battery [*Carlsen* v. *Javurek,* 526 F.2d 202, 210 (8th Cir. 1975)], illegal narcotics possession [*United States* v. *Brown,* 409 F. Supp. 890 (W.D.N.Y. 1976)], and smuggling and using heroin [*United States* v. *Gross,* 603 F.2d 757 (9th Cir. 1979)]. Indeed, prior to the instant decision, another Second Circuit panel had stated, in *United States* v. *Hayes,* 553 F.2d 824 (2d Cir.), *cert. denied,* 434 U.S. 867 (1977), that a prior conviction for smuggling cocaine, which it described as ranking "high on the scale of veracity-related crimes" (553 F.2d at 828), could *not* be introduced under rule 609(a)(2) "[i]f this importation involved nothing more than stealth" (*id.* at 827). As the Court there explained, a crime committed by stealth—*i.e.,* non-communication—is not within 609(a)(2), which is

> "restricted to convictions that bear *directly* on the likelihood that the defendant will *testify* truthfully (and not merely on whether he has a propensity to commit crimes)" 553 F.2d at 827.

In upholding the admissibility of Klein's prior conviction for non-filing of withholding tax returns, the Courts below are in direct conflict with the rationale of these prior decisions. Non-filing, by definition, is the antithesis of communicating dishonestly; while the filing of a false return would involve dishonesty, the prior conviction of non-filing represents a refusal so to communicate dishonestly, just as a refusal to testify, albeit a contempt, could not be equated to the commission of perjury for purposes of 609(a)(2).

2. *Non-Filing Conviction Does Not Involve An Element Of Intent To Deceive Or Defraud*—The decisions below, in holding that the non-filing misdemeanor involved a fraud, probative of petitioner's propensity to testify truthfully, are also in conflict with decisions of this Court and of other circuits that a conviction for non-filing does not require an intent to deceive or defraud. *Spies* v. *United States,* 317 U.S. 492, 497-98 (1943);

United States v. *Klee,* 494 F.2d 394, 395n.1 (9th Cir.), *cert. denied,* 419 U.S. 835 (1974); *United States* v. *Lachmann,* 469 F.2d 1043, 1045 (1st Cir. 1972), *cert. denied,* 411 U.S. 931 (1973).

3. *Rule 609 Determination Of Admissiblilty Of A Prior Misdemeanor Conviction Must Be Made On The Basis Of The Elements Of That Crime*—Implicitly acknowledging that a non-filing prior conviction would not ordinarily be considered a *crimen falsi* offense, the Court below rested its admissibility on facts extrinsic to the elements necessary to that judgment of conviction. In thus authorizing a trial-within-a-trial to determine the specific facts on which the jury relied in voting the prior conviction, as distinguished from the legal elements of the crime, the Court below is in conflict with the reasoning of prior decisions of this Court and of various circuits.

For example, this Court ruled in *Bridges* v. *United States,* 346 U.S. 209, 221 (1953), that the wartime suspension of limitations, 18 U.S.C. § 3287, statutorily applicable to any offense "involving fraud or attempted fraud," was "limited strictly to offenses in which defrauding or attempting to defraud . . . is an *essential ingredient of the offense charged*" (emphasis in original). Similarly, in determining whether a prior conviction involves moral turpitude so as to permit deportation of an alien under the Immigration and Nationality Act [now 8 U.S.C. § 1251(a)(4)], the Fourth Circuit expressly rejected the procedure adopted by the Courts below here, as "contrary to the well established rule in federal courts that the . . . court need not go beyond the record of conviction," because "Congress did not intend to saddle . . . the courts with the extremely difficult and time-consuming burden of developing the facts surrounding the commission of the crime for which the alien was convicted." *Castle* v. *Immigration and Naturalization Service,* 541 F.2d 1064, 1066n.5 (4th Cir. 1976). *Accord: United States* v. *Day,* 51 F.2d 1022 (2d Cir. 1931).

The legislative history indicates that admissibility under 609(a)(2) likewise depends on the presence of "some *element*

of deceit, untruthfulness, or falsification." Conf. Rep. No. 93-1597, *supra* (emphasis added). Although initially paying lip service to this limitation to the elements of the prior conviction, various circuits have, without citation of any authority therefor, slowly moved towards the holding of the Courts below that a prior misdemeanor conviction, having no element involving dishonesty or false statement, may still be admissible under 609(a)(2) if counsel demonstrates that the conviction rested on facts warranting the "dishonesty or false statement" description. This suggestion was first mentioned in *Government of Virgin Islands* v. *Toto, supra,* where, while expressly stating in the text that a 609(a)(2) misdemeanor required "some *element* of deceitfulness, untruthfulness, or falsification" (529 F.2d at 281; emphasis added), the court speculated in a footnote that it was "conceivable" that admissibility could be based on the facts behind the misdemeanor conviction. Building solely on this speculative footnote, the District of Columbia Circuit proceeded to suggest, again in footnote, that resort to the facts underlying a misdemeanor conviction would only be appropriate "[w]here the formal title of an offense leaves room for doubt." *United States* v. *Smith, supra,* 551 F.2d at 364n.28.[4] The Second Circuit joined the trend in dictum, relying solely on the *Smith* footnote. *United States* v. *Hayes, supra,* 553 F.2d at 827. Then, citing the *Toto* and *Smith* footnotes and the *Hayes* dictum for its finding that "these courts have adopted the rule that . . . the prior conviction may . . . be admitted . . . if [the prosecutor shows] that the conviction 'rested on facts warranting the dishonesty or false statement description'," the Seventh Circuit approved admissibility of a prior misdemeanor conviction for theft, on the basis that the facts showed that it was a plea bargain reduction of an original forgery charge. *United States* v. *Papia,* 560 F.2d 827, 847 (7th Cir. 1977).

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[4] The District of Columbia Circuit subsequently repeated its *Smith* footnote in *United States* v. *Dorsey,* 591 F.2d 922, 935 (D.C. Cir. 1978), and after remand, *sub nom. United States* v. *Crawford,* No. 79-1373, slip op. (D.C. Cir. Nov. 29, 1979).

These decisions have misconstrued rule 609 by ignoring, as the legislative history expressly reflects, that, while 609(a)(1) was intended to create a "discretionary standard" requiring the trial court to go beyond and behind the judgment of prior conviction (Conf. Rep. No. 93-1597, *supra*), "[t]he admission of prior convictions involving dishonesty and false statement [*i.e.*, 609(a)(2)] is *not* within the discretion of the Court" (*ibid.*; emphasis added). Moreover, these decisions have carefully avoided giving guidance to the district courts on how each court can obtain the omniscience necessary to know that the jury which convicted the defendant on the prior misdemeanor did so in reliance on that part of the evidence which might warrant the dishonesty or false statement description, and not just on the remaining evidence, particularly as the issue can only arise where the *elements* which the jury must find to convict do not involve dishonesty or false statement.[5]

B. Testimony Suggestive Of Other Tax-Related Misconduct By Klein, Not Resulting In The Conviction Of A Crime

The prosecutor twice posed questions—first in direct examination of a government witness (JA908-14) and later during his cross-examination of Klein (JA1195-203)—to establish that Klein had received advances from ABKCO which, though reflected on ABKCO's books, were never repaid, vouchered, or reported as income by him. The prosecutor offered such evidence to establish Klein's "attitude with respect to the

[5] There are probably few, if any, misdemeanor convictions as to which a subsequent prosecutor could not argue that some evidence that had been introduced permitted an implication of dishonesty or false statement. Thus, allowing 609(a)(2) admissibility merely on that basis would effectively destroy the distinction between 609(a)(1) and 609(a)(2), and undercut the clear Congressional intent that 609(a)(2) be restricted to "a fairly narrow subset of criminal activity"—the relatively few having a bearing on the accused's propensity to testify truthfully. *United States* v. *Smith, supra,* 551 F.2d at 362.

payment of taxes" (JA757), "his dishonesty" (JA1469a), and "his lack of candor" (JA1393-94, 1469a).[6]

Similarly, the prosecutor, on four separate occasions in questioning three of his witnesses (JA277, 281, 824, 915-18), also referred to and elicited testimony on the subject of Klein's alleged involvement in bribe payments to customs officials.

This questioning, intended to paint petitioner as a generally "bad" person, violated the prohibition in rule 404(a), F.R.Ev., against evidence of uncharged crimes to show bad character or tendencies toward criminality. In sanctioning it, the Court below was in conflict with the principle expressed by this Court in *Michelson* v. *United States,* 335 U.S. 469, 475-76 (1948), that evidence of an accused's specific criminal acts or other misconduct must be excluded because it would "weigh too much with the jury and . . . overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Likewise, the Court below was in conflict with decisions of other circuits, as well as with other panels of the Court below, which excluded evidence of irrelevant conduct, suggestive of misconduct, and not resulting in a conviction of a crime. *United States* v. *Manafzadeh,* 592 F.2d 81, 89 (2d Cir. 1979); *United States* v. *Turquitt,* 557 F.2d 464, 468 (5th Cir. 1977); *Courtney* v. *United States,* 390 F.2d 521, 529-30 (9th Cir.), *cert. denied,* 393 U.S. 857 (1968); *United States* v. *Weiler,* 385 F.2d 63 (3d Cir. 1967); *Manley* v. *United States,* 238 F.2d 221 (6th Cir. 1956).

[6] The prejudicial effect of this evidence is underscored by contrasting the $10-12,000 amount of unvouchered advances for the three indictment years with Klein's total reported income of over $500,000 for the same three years (JA908-09, 1782-1817).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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OPINION AND JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued November 19, 1979—Decided December 17, 1979)

UNITED STATES OF AMERICA,
Appellee,
v.
ALLEN KLEIN,
Appellant.

Docket No. 79-1292

Before:

MULLIGAN, MESKILL AND KEARSE,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Allen Klein appeals from a judgment of conviction entered on August 9, 1979, after a ten-week jury trial before Vincent L. Broderick, *Judge*. Of the many claims of error raised on appeal, only two warrant discussion.

First, Klein argues that count four of the indictment, which charged him with filing a false income tax return for 1970, was a multiplicitous restatement of a lesser included offense within count one, which charged him with tax evasion for 1970, and

therefore that his conviction on count four cannot stand. See 26 U.S.C. §§ 7201 and 7206(1). A claim of error based on the submission to the jury of what is claimed to be a multiplicitous lesser included offense is waived unless timely objection is made. *United States* v. *Harary,* 457 F.2d 471, 479 (2d Cir. 1972). Klein's motion to dismiss the false filing counts prior to an earlier trial before Judge Metzner did not constitute a timely objection to the submission of the false filing counts to the jury hearing the second trial. Judge Broderick found that far from making his objection known at any time during the second trial, as did the Harary defendant, appellant engaged in a course of conduct that indicated his agreement that the false filing counts should go to the jury along with the evasion counts. This finding, which we cannot characterize as clearly erroneous, precludes our consideration of appellant's multiplicity argument on appeal.

Second, Klein, who took the stand in his own defense, contends that the district judge erred in permitting the government to question him, during cross-examination, about a prior misdemeanor conviction for failing to make and file quarterly returns of federal taxes withheld from the wages of employees, in violation of 26 U.S.C. § 7203. Under Fed. R. Evid. 609(a)(2) this evidence was properly admitted for the purpose of attacking Klein's credibility.

Where a crime is neither clearly covered nor clearly excluded by the language of Rule 609(a)(2), the prosecutor must present specific facts relating to dishonesty or false statement. *United States* v. *Hayes,* 553 F.2d 824, 827 (2d Cir. 1977). Judge Broderick found, after extensive argument, that Klein's earlier conviction involved both a defrauding of the revenue and dishonesty. We see no error in this determination.

Klein's other attacks on the evidentiary rulings of the district court and on the court's charge to the jury are without merit.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of January, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. MULLIGAN
HON. THOMAS J. MESKILL
HON. AMALYA L. KEARSE

Circuit Judges.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ALLEN KLEIN, *Defendant-Appellant.*	Docket No. 79-1292

A petition for a rehearing having been filed herein by counsel for the Appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

Daniel Fusaro,
Clerk

Order Denying Rehearing In Banc

United States Court of Appeals

Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of January, one thousand nine hundred and eighty.

United States of America, *Plaintiff-Appellee.* v. Allen Klein, *Defendant-Appellant.*	Docket No. 79-1292

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Allen Klein, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

Irving R. Kaufman
Irving R. Kaufman,
Chief Judge

Opinion of the District Court

[474 F. Supp. 1243]

United States District Court

Southern District of New York

[July 27, 1979]

United States of America, *Plaintiff,* v. Allen Klein *Defendant.*	77 Cr. 234

Appearances:

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Vincent L. Broderick,
District Judge.

I. Introduction

Defendant was indicted on three counts of tax evasion for the years 1970, 1971, and 1972, see 26 U.S.C. § 7201, and three counts of filing false tax returns for the same years. See 26 U.S.C. § 7206(1).[1]

After trial, the jury returned a verdict of guilty on the false filing count for the year 1970, and of not guilty on the other five counts.

The case is now before me on defendant's motion for judgment of acquittal n.o.v. or, in the alternative, for a new trial. Defendant has also applied, on the basis of his Brady claim, see *infra,* for an evidentiary hearing.

II. Conclusion

For the reasons that follow, I deny the motion and the application for a hearing.

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[1] **26 U.S.C. § 7201 provides:**

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(1) provides

Fraud and false statements

Any person who

(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * * * * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The counts covered the same years. Thus the tax evasion counts, 1, 2, and 3 covered 1970, 1971, and 1972, respectively; and the false filing counts, 4, 5, and 6, also covered 1970, 1971, and 1972, respectively.

III. Discussion

Defendant has stated various grounds for his motion, only four of which are considered herein.[2] These grounds are (A) that the court erred in denying defendant's pre-trial motion to dismiss count 4, which motion was based on the allegation that count 4 was a multiplicitous restatement, as a lesser included offense, of count 1; (B) that the court erred in failing to charge the jury, as requested by defendant, that Peter Bennett, the chief Government witness, had a pecuniary motivation to falsify his testimony; (C) that the court erred in precluding defendant from adducing evidence of an alleged character trait of Joel Silver, an associate of defendant; and (D) that the Government violated its obligations under *Brady* v. *Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to produce to the defense allegedly exculpatory material regarding a Government agent's interview of the entertainer Bobby Vinton. I shall consider these grounds *seriatim.*

A. *Multiplicity*

Defendant argues that the court erred in allowing count 4, on which defendant was convicted, to go to the jury because count 4 was multiplicitous of count 1 and because defendant had timely, if unsuccessfully, moved to have count 4 stricken from the indictment.

The main authority for this argument is *United States* v. *Harary,* 457 F.2d 471 (2d Cir. 1972). There the court of appeals held that it was reversible error for the trial court "to submit a lesser charge to the jury . . . [when] no 'disputed factual element' which distinguishes the offenses is present *and, in addition, the defendant makes a timely motion or objection at the trial." Id.* at 479 (emphasis added).[3]

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[2] After a review of defendant's original motion papers, I held a conference at which I directed that the Government need respond only to the first three grounds considered herein. The fourth ground considered herein was raised by defendant by way of a supplementary motion. To the extent that defendant's motion is based on grounds not considered herein, I deny the motion.

[3] On the basis of this holding the court concluded that "[s]ince [defendant] cannot be retried on the greater offense because of his acquittal on that count, our only course is to remand to the district court with instructions to dismiss the indictment." *Id.* at 479-80.

However, unlike in *Harary, supra,* defendant herein did not make a timely motion or objection at trial with respect to count 4. Nor did he make any such motion or objection before me prior to trial.

Indeed, all of defense counsel's conduct before and during the trial before me indicated that defendant agreed that count 4 (and counts 5 and 6) should go to the jury. For example, defense counsel's proposed jury instructions, which I required be submitted before trial, included five proposed instructions that explicitly pertained to counts 4, 5 and 6. See Defendant's Preliminary Requests For Jury Instructions, Requests Nos. 14-19.[4] *See also* Defendant's Supplemental Request For Jury

[4] In fact defense counsel's proposed jury instructions included two separate and specific requests as to the elements of counts 1, 2, and 3, on the one hand, and counts 4, 5, and 6, on the other. These requests read as follows:

Request No. 10—Counts One Through Three: The Essential Elements of the Crime of Tax Evasion

Specifically, counts one, two and three of the indictment charge Mr. Klein with wilfully and knowingly attempting to evade and defeat part of the income tax due and owing by him and his wife for the calendar years 1970, 1971 and 1972 by preparing, signing and mailing false and fraudulent income tax returns for those years.

Three essential elements are required to be proved in order to establish the offenses charged in these counts of the indictment:

FIRST: The prosecution must prove beyond a reasonable doubt that a substantial additional amount of Federal income tax was due and owing from Mr. Klein for each of the calendar years in question, over and above the amount of tax declared or disclosed in the defendant's income tax return for each calendar year; and

SECOND: The prosecution must prove beyond a reasonable doubt that Mr. Klein in fact knew a substantial amount of Federal income tax was due and owing to the government for each of the calendar years in question, over and above the amount declared or disclosed in the income tax return for each calendar year; and

THIRD: The prosecution must prove beyond a reasonable doubt that Mr. Klein knowingly and wilfully attempted, in some manner, to evade or defeat such additional tax, with the specific intent to defraud the government of such additional tax.

The burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime for each

Instructions, Supplementary Request No. 19A (submitted at the close of the evidence). Moreover, during a colloquy prior to the summations, the Government expressly stated its view that there may be a factual element that distinguishes count 4 from count 1 and that, therefore, it would be possible for the jury

of the calendar years mentioned. Unless the prosecution proves beyond a reasonable doubt every essential element, you must acquit. *Willingham* v. *United States,* 289 F.2d 283 (5th Cir.), *cert. denied,* 368 U.S. 828, 82 S.Ct. 49, 7 L.Ed.2d 31 (1961); *Ingram* v. *United States,* 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959). *Id.*

Request No. 14—Counts Four through Six. The Essential Elements of the Crime of False Filing

Specifically, counts four, five and six of the indictment charge Mr. Klein with unlawfully, knowingly and wilfully making, subscribing and filing the income tax returns for the years 1970, 1971 and 1972, which were verified by written declarations that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter at the time he made, subscribed and filed the returns in that he then and there knew and believed that he had substantial income in the form of cash payments from the sale of promotional records, not stated upon the returns;

Four essential elements are required to be proved in order to establish the offenses charged in counts four through six of the indictment.

FIRST: The prosecution must prove beyond a reasonable doubt that the tax return in question was signed and filed by Mr. Klein,

SECOND: The prosecution must prove beyond a reasonable doubt that the tax return in question contains or is verified by a written declaration that it is made under the penalties of perjury, Mr. Klein does not dispute either of these elements, that is, that he signed and filed the tax returns in question which, as all such returns, contain a written declaration that it is made under penalties of perjury,

THIRD: The prosecution must prove beyond a reasonable doubt that, at the time the return was so signed and filed, Mr. Klein did not believe the return to be true and correct as to a material matter, here being the income reported thereon; and

FOURTH: The prosecution must prove beyond a reasonable doubt that such act was done wilfully and with criminal intent.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime for each of the fiscal years mentioned. Unless the prosecution proves beyond a reasonable doubt every essential element, you must acquit. *Kolaski* v. *United States,* 362 F.2d 847, 848 (5th Cir. 1966). *Id.*

rationally to return a verdict of guilty on count 4 and not guilty on count 1. Transcript ("Tr.") 5788-91. Although defense counsel termed the Government's attempt to draw the distinction "an academic exercise," *id.* 5790, he did not take the opportunity to object to count 4 as multiplicitous. Instead, he expressly asked for particular instructions "in connection with [counts] 4, 5, and 6. . . ." Tr. 5791. *See also id.* 5792. Finally, I explicitly asked counsel this question: "The one problem I want to raise with you has to do with the elements of Counts 4, 5, and 6. Does either of you have any trouble with those elements?" Tr. 5837. Although defense counsel did state that he believed that the factual issue in counts 4, 5 and 6 was the same as the factual issue in counts 1, 2, and 3, Tr. 5839-40, his statement was made for the sole purpose of clarifying what he believed to be the proper instructions as to counts 4, 5, and 6. Defense counsel did not object, explicitly or implicitly, to the submission of counts 4, 5, and 6 to the jury.

Defendant concedes that he never raised the issue of multiplicity before me. He argues, however, that he satisfied the requirements of *Harary, supra,* by having made an unsuccessful pre-trial motion to dismiss counts 4, 5, and 6 before Judge Metzner prior to the first trial of this case.[5] In this connection, defendant relies on the doctrine of the law of the case as a reason for his failure to renew the motion before me prior to or during the retrial.[6]

[5] The case was first tried before Judge Metzner in 1977. The trial resulted in a hung jury. After appellate proceedings, the case was returned to me for retrial.

[6] An appropriate time for defendant to renew the motion would have been at the conclusion of the Government's case in the retrial before me. *See United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 225, 73 S.Ct. 227, 231, 97 L.Ed. 260 (1952):

> Whether an aggregate of acts constitute a single course of conduct and therefore a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and *may have to await the trial on the facts.*
>
> . . . [A] draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particulars, to render the various counts more specific. In any event, by an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because *at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense.* (emphasis added).

Particularly in light of the fact that defendant zealously renewed before me many applications upon which Judge Metzner had previously ruled[7] and in light of the fact that the parties understood that Judge Metzner's rulings would not be considered binding[8], I reject defendant's law of the case argument. In this circuit the law of the case doctrine is a discretionary doctrine and not a rule of law that precludes reconsideration by one judge of a ruling earlier made in the same case by another judge. *E.g., Dictograph Prods. Co.* v. *Sonotone Corp.,* 230 F.2d 131, 134-36 (2d Cir.) (L. Hand, J.), *appeal dismissed,* 352 U.S. 883, 77 S.Ct. 104, 1 L.Ed.2d 82 (1956).[9] Thus, in *United States* v. *Richardson,* 291 F. Supp. 441 (S.D.N.Y. 1968), the court expressed the opinion that a defendant in a criminal case need not obtain leave of court to

Defendant now contends, as he contended in his pretrial motion papers submitted to Judge Metzner, that the parties agreed all along that the only factual issue in the case relevant to any of the counts was whether or not Bennett gave defendant proceeds from the sale of promotional records. However, the Government explicitly asserted in its opposition papers to defendant's motion before Judge Metzner that "[w]hether or not there is a multiplicity in this indictment can not be properly determined until the Government's case is presented." Government's Memorandum of Law in Opposition to Defendant's Pre-Trial Motion at 15 (filed June 7, 1977). In light of the fact that there is often an important difference between what the parties expect will be proved at trial and what is actually proved at trial, the Government's assertion seems to be correct.

[7] For example, although Judge Metzner had allowed evidence of a prior conviction of defendant to be received in the first trial, defendant moved before me to have evidence of the conviction excluded in the retrial. *See* Memorandum in Support of Defendant's Pre-Retrial Motions at 5-17 (filed December 13, 1977).

[8] *See id.* at 4-5.

[9] Cited in Memorandum in Support of Defendant's Pre-Retrial Motions as support for the proposition that "[t]he law of the case doctrine is not applicable to bind the judge presiding at a second trial by an order or ruling made by the judge at the first trial." *Id.* at 4.

renew before a second judge a motion previously ruled upon adversely to him by a different judge:

> This court is of the opinion that leave to renew a motion is not necessary to its renewal under the modern interpretation of "law of the case". *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131 (2d Cir. 1956), appeal dismissed, 352 U.S. 883, 77 S.Ct. 104, 1 L.Ed.2d 82 (1956); *Chain Locations of America, Inc.* v. *East Hudson Parkway Authority,* 280 F. Supp. 396 (S.D.N.Y. 1967). This interpretation provides that reconsideration of a motion on its merits is a matter of discretion with the second judge, . . . The fact that this modern interpretation has been applied to date only in civil cases is of no moment. American jurisprudence favors the criminal defendant over the civil in that his burden of proof is smaller and he is presumed innocent of wrongdoing. Consequently, he should be given at least as favorable treatment as the civil party in renewing his motions, especially since his life or liberty is at stake.

Id. at 443. Accordingly, defendant's multiplicity argument is rejected.[10]

B. *Alleged Pecuniary Motive*

Defendant also argues that the court erred in rejecting defendant's request that the jury be instructed that Peter Bennett, the chief Government witness,[11] had a motive to lie on

[10] *Travis* v. *United States,* 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961), relied on by defendant in support of his law of the case argument, is distinguishable from this case. There, the pre-trial motion to dismiss on venue grounds had been denied by the trial court, but the court of appeals, which reversed on another ground on the first appeal, specifically approved of the laying of venue in the trial court. *Id.* at 633, 81 S.Ct. 358. In light of the court of appeals' ruling concerning venue, it was not open to defendant to renew his venue motion in the trial court upon the retrial.

[11] Bennett, who has pled guilty to one count of false filing for 1970, was alleged by the Government to have been the co-conspirator and righthand man of defendant in the record selling scheme that gave rise to the prosecution in this case.

the stand in that Bennett, whose civil tax liability for the relevant years is still undetermined, may have believed that his helping to obtain a conviction of defendant would curry him favor with the Internal Revenue Service. My refusal to give such an instruction was based in large part on a hearing held out of the presence of the jury at which I.R.S. Agent Sidney Connor, under examination by both parties and the court, gave testimony that firmly established that Bennett had no reason to believe that he would stand to gain pecuniary benefit from the I.R.S. by helping to obtain a conviction of defendant. Given the absence of evidence that Bennett could have reasonably believed that he stood to gain pecuniarily, I concluded that the requested instruction regarding Bennett's pecuniary motive to falsify was not warranted.[12]

C. *Joel Silver's Alleged Character Trait*

The evidence in the Government's case against defendant tended to establish that Bennett gave Joel Silver, an associate of defendant, some of the proceeds from the sale of promotional records which Silver was to hold for defendant, and that Bennett told Silver that the money had come from the sale of such records. Defendant contends that Bennett gave this information to Silver as a part of an effort to frame defendant so that Bennett would have a scapegoat in case Bennett, who defendant asserts was working alone in the record selling scheme, was discovered. Defendant further contends that Silver was particularly selected by Bennett in the frame-up because Silver was known to be "closed-mouthed" and thus would be unlikely to discuss the matter with anyone, including the defendant Klein himself. In light of all this, defendant contends that the court erred in precluding him from adducing testimony from Silver and from Henry Newfeld, another of defendant's associates, to the effect that Silver was known to have the character trait of being closed-mouthed.

[12] Thus this case is distinguishable from *United States* v. *Frank,* 494 F.2d 145 (2d Cir.), *cert. denied,* 419 U.S. 828, 95 S.Ct. 48, 42 L.Ed.2d 52 (1974). There it was clear that the prosecution witness had a pecuniary motive to falsify because convictions in the criminal suit would have operated as collateral estoppel in favor of the witness in her then-pending civil suit against the same defendants. *See id.* at 160.

The relevant principle is stated in Rule 404, Fed.R.Evid., which reads in part:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, . . .

It is true, as defendant asserts, that Rule 404 does not preclude character evidence if that evidence is offered to prove a material proposition, rather than to prove an act:

> Character evidence offered to prove character when it is a consequential, material proposition, rather than to prove an act, does not fall within the prohibition of the rule and, consequently, is admissible.

2 Weinstein's Evidence ¶ 404[01] at 404-12 (Bender 1977) (footnotes omitted). It is also true, as defendant asserts, that the evidence regarding Silver was offered by defendant to prove a material proposition, namely, that Bennett chose to go to Silver because of Silver's alleged character trait. To that extent, therefore, the evidence was *prima facie* admissible. *See* Rule 402, Fed.R.Evid. (relevant evidence generally admissible).

However, the evidence, if admitted, would also have had the inevitable effect of tending to lead the jury to believe that, upon the relevant occasions, Silver acted in conformity with the alleged trait and that, for that reason, rather than because, *e.g.*, he believed Bennett, he refrained from talking with Klein about the matter. Thus, in light of the dual purpose of the proposed evidence and because one of the purposes was impermissible under Rule 404, I was authorized to exclude the proposed evidence. To the extent that the proposed evidence was offered for the purpose of proving that Silver acted in conformity with the alleged character trait on a particular occasion, Rule 404 itself authorized the exclusion of the evidence. *See Reyes* v. *Missouri Pac. R. R.*, 589 F.2d 791, 793 (5th Cir. 1979) ("This general rule of exclusion [in Rule 404], applicable to both civil and criminal proceedings, is based upon the assumption that

such evidence is of slight probative value yet very prejudicial.") (footnotes omitted). To the extent that the proposed evidence was offered for the purpose of proving a material, consequential proposition, Rule 403 authorized the exclusion of the evidence because the evidence still would have had the inevitable effect of tending to lead the jury to believe that, upon the relevant occasions, Silver acted in conformity with the alleged character trait. Rule 403, Fed.R.Evid. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, *or misleading the jury* . . . .") (emphasis added).[13]

This reasoning is consonant with the fact that I permitted defendant to adduce evidence from Bennett himself regarding Silver's alleged character trait. *See* Tr. 1206. What Bennett himself believed about Silver's having the alleged character trait was much more probative of defendant's frame-up theory than what Silver or Newfeld believed. *See* Rule 404. Moreover, evidence of Bennett's belief was sufficiently probative as to that theory so that Rule 403 considerations did not require me to exclude the evidence on the grounds that the evidence also was likely to have had the effect of tending to lead the jury to believe that, upon the relevant occasions, Silver acted in conformity with the alleged trait.

D. *Defendant's Brady Claim*

As a fourth ground for his motion, defendant relies on *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). In particular, defendant argues that the Government violated its *Brady* obligations by failing to produce to defendant information regarding an interview be-

[13] Rule 403, also authorized the exclusion of the disputed evidence even if such evidence is deemed to be evidence of "habit." *See* Rule 406.

tween I.R.S. Agent Sidney Connor and the entertainer Bobby Vinton.

Vinton was once a client of defendant, and Vinton records are alleged to have been among those involved in the promotional record selling scheme that gave rise to the prosecution in this case. Bennett testified that Klein supplied him with the Vinton promotional records that Bennett allegedly sold for Klein.

Klein now contends that information gained from the April 13, 1979 interview between Connor and Vinton could have been used to impeach Bennett on this point. The Government, on the other hand, contends that the evidence would not have been "material to either guilt or to punishment," *Brady supra,* 373 U.S. at 87, 83 S.Ct. at 1197, and thus need not have been provided to defendant.

The Government also contends, and I agree, that the relationship between defendant and Vinton was such that, regardless of what information the disputed interview had yielded, the Government would have had no *Brady* obligation to defendant with respect to such information. The reason for the absence of such obligation is that, given the relationship between defendant and Vinton, defendant "was also on notice of the essential facts which would have enabled him to call [Vinton] and thus take advantage of any exculpatory testimony that he might furnish." *Williams* v. *United States,* 503 F.2d 995, 998 (2d Cir. 1974) (alternative holding). "In view of this, [I] see no occasion to invoke *Brady.*" *United States* v. *Tramunti,* 500 F.2d 1334, 1350 (2d Cir.), *cert. denied,* 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673 (1974). *Accord, United States* v. *Ruggiero,* 472 F.2d 599, 604-05 (2d Cir.), *cert. denied,* 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1973).[14]

SO ORDERED.

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[14] In view of my disposition of defendant's *Brady* claim, I need not reach the question of whether the information gained in the Vinton interview was "material" within the meaning of Brady. Accordingly, no evidentiary hearing on that question is necessary.

STATUTES AND RULES INVOLVED

26 U.S.C. § 7201

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7203

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. § 7206

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who

(1) *Declaration Under Penalties Of Perjury*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

. . . .

* * * *

Shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Rule 12, Federal Rules of Criminal Procedure

Rule 12. Pleadings and Motions before Trial; Defenses and Objections

(a) *Pleadings and Motions.* Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

* * * *

(e) *Ruling on Motion.* A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) *Effect of Failure to Raise Defenses or Objections.* Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

Rule 404, Federal Rules of Evidence

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 609(a), Federal Rules of Evidence

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Supreme Court, U. S.
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No. 79-1342

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALLEN KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

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ALLEN KLEIN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for filing a false income tax return for 1970, in violation of 26 U.S.C. 7206(1). He contends that (1) the trial court erred in holding that he had waived any objection to inclusion in the indictment of an allegedly multiplicitous lesser-included offense; (2) the trial court erred in permitting testimony relating to petitioner's prior conviction for failure to file tax returns; and (3) the trial court erred in permitting the admission into evidence of other tax-related misconduct of petitioner which had not resulted in conviction.

The pertinent facts may be summarized as follows: Petitioner was charged with attempted income tax evasion for 1970, 1971, and 1972, in violation of 26 U.S.C. 7201, and with filing false income tax returns for those same three years, in violation of 26 U.S.C. 7206(1) (Pet. App. 6a). Prior to trial, petitioner moved to dismiss the false return counts on the ground that they were multiplicitous

restatements of the first three counts of the indictment charging tax evasion (A. 2060).[1] The district court denied this motion on the authority, *inter alia*, of *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) (A. 2072(52)). Petitioner did not renew this motion during the trial. When the jury was unable to reach a verdict, the district court declared mistrial (Pet. App. 10a & n.5). Thereafter, petitioner was retried, with a different judge presiding, convicted on Count 4 for filing a false tax return for the year 1970 and sentenced to a two-year term, with all but two months suspended, and a fine of $5,000 (A. 24). Prior to the retrial, the district court informed petitioner that rulings in the prior trial would not be considered binding during the retrial (Pet. App. 11a). Neither prior to nor during the retrial did petitioner move to dismiss Count 4, the false return count on which he was convicted (Pet. App. 8a).

The evidence at trial established that petitioner failed to report on his 1970 tax return substantial cash income he received from the sale of promotional records obtained by him from Capitol Records. Petitioner's failure to disclose the receipt of the record proceeds on his personal income tax return was the basis for the false filing count (A. 15-16).

1. Petitioner contends (Pet. 8-15) that the district court erred in not granting his motion, made prior to the first trial, to dismiss Count 4 of the indictment (filing a false tax return for 1970), on the ground that it was a multiplicitous lesser-included offense of Count 1 of the indictment (attempted tax evasion for 1970). But the district court and the court of appeals correctly held that petitioner had failed to raise a timely objection of

[1]"A." refers to the separately bound joint appendix filed in the court of appeals.

multiplicity and therefore waived any objection he might have had (Pet. App. 1a-2a).[2]

Petitioner acknowledges (Pet. 10-12) that he did not object to Count 4 on the ground of multiplicity either prior to or during the retrial. He does not dispute that he could have waived his claim of multiplicity, but he now contends that the first trial court's ruling denying his motion to dismiss Counts 4 through 6 of the indictment became the law of the case so that he was not required to renew this objection at the retrial in order to preserve his objection.

For present purposes, the "law of the case" doctrine provides generally that where a trial court judge renders a decision and issues an order in a case, and thereafter the case is transferred to another trial judge, the latter judge will respect and not overrule the first judge's decision and order. *Stevenson* v. *Four Winds Travel, Inc.*, 462 F. 2d 899, 904-905 (5th Cir. 1972). The doctrine, however, is not an absolute rule; rather, it is merely a rule of practice which a judge, in his discretion, may decline to follow. *Evans* v. *Calmar S.S. Co.*, 534 F. 2d 519, 521 (2d Cir. 1976); *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 134-136 (2d Cir.), cert. dismissed, 352 U.S. 883 (1956).

Here, in the retrial, the trial court made it clear that he did not consider the rulings made in the first trial binding upon him (see A. 2137-2138).[3] Petitioner has not argued

[2]It is not altogether clear that Count 4 was a multiplicitous restatement, as a lesser-included offense, of Count 1 (see Pet. App. 9a-10a). Because they found that petitioner had waived any objection based on multiplicity, neither court below reached the merits of this question.

[3]It is not at all clear that the judge in the first trial intended that his ruling denying petitioner's motion to dismiss the false filing counts for multiplicity should operate as a final ruling on the claim. In opposing the motion to dismiss for multiplicity at the first trial, the government argued that the question of multiplicity was better resolved after the evidence was presented (see A. 2094-2101). The trial

that the judge in the retrial abused his discretion in refusing to be bound by the rulings made at the first trial. Indeed, he can hardly do so in light of his contention in a memorandum filed before the retrial that the law of the case doctrine was inapplicable (see A. 2103). In these circumstances, there is no basis for petitioner's claim that his failure at the retrial to renew his multiplicity objection was based upon his belief that the law of the case doctrine precluded him from renewing the objection. His failure to renew the multiplicity objection amounted to a clear waiver of that claim.

Moreover, as the court of appeals suggested (Pet. App. 2a), petitioner's conduct during the second trial would appear to have been guided by a recognition that it was beneficial to him to have the lesser-included offense of Section 7206(1) considered by the jury. See *United States* v. *Tsanas*, 572 F. 2d 340, 345 (2d Cir.), cert. denied, 435 U.S. 995 (1978). Indeed, as the district court noted (Pet. App. 9a-10a & n.4), petitioner not only failed to object to the court's submission of Count 4 to the jury, he submitted requested instructions on that count. In addition, while not renewing his multiplicity objection, petitioner did renew in the retrial many of the motions and applications which had been submitted to and ruled upon by the judge in the first trial (Pet. App. 11a). In sum, petitioner plainly made a deliberate

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judge pointed out that the first three counts of the indictment charged an evasion of tax by the filing of a false and fraudulent tax return, while the latter three counts of the indictment charged the verification, under penalties of perjury, of the tax returns which petitioner did not believe to be true. The court then denied the motion, relying upon the same cases which the government had cited in support of its claim that the question of multiplicity was better resolved after the evidence was presented at trial (see A. 2072(52), 2095-2096). It therefore appears that the judge was merely denying the motion as premature and indicating that the motion should be renewed at the close of the evidence. In the circumstances, the doctrine of the law of the case could hardly operate to preclude the judge at the retrial from considering any claim of multiplicity.

choice in the retrial not to object to the false filing counts.[4] The courts below therefore correctly concluded that he had waived any objection on the ground of multiplicity.[5]

2. Petitioner further contends (Pet. 16-20) that the district court improperly allowed the prosecutor, on cross-examination of petitioner, to adduce evidence of a prior misdemeanor conviction under 26 U.S.C. 7203 for failing to make and file quarterly returns of federal income and F.I.C.A. taxes withheld from the wages of employees. In petitioner's view, the commission of a failure to file offense does not involve "dishonesty or false statement."

It is settled, however, that crimes that involve defrauding the revenue are admissible under Fed. R. Evid. 609(a)(2) to impeach the credibility of a witness. *United States* v. *Apuzzo*, 555 F. 2d 306 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978). Accord, *United States* v. *De Angelis*, 490 F. 2d 1004 (2d Cir.), cert. denied, 416 U.S. 956 (1974). Petitioner's prior conviction for willfully failing to make and file withholding tax returns clearly

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[4]If the first trial judge had dismissed Count 4, the government would have been entitled to a lesser-included offense instruction. See Fed. R. Crim. P. 31(c); *Keeble* v. *United States*, 412 U.S. 205, 208 (1973). It is therefore difficult to understand how petitioner was harmed by the second trial judge's failure *sua sponte* to dismiss that count.

[5]Petitioner contends (Pet. 14-15) that the decision below conflicts with decisions of this Court which hold that a waiver can be found only if there has been an " 'intentional relinquishment * * * of a known right' " and that an evidentiary hearing must be held to determine whether a waiver has occurred. The decisions (*Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Humphrey* v. *Cady*, 405 U.S. 504 (1972); and *Henry* v. *Mississippi*, 379 U.S. 443 (1965)) upon which he relies, however, do not support his claim. Each of those cases dealt with the question whether there had been a waiver of a constitutional right. There is no similar right involved here. At all events, where, as here, there was no doubt that the defendant was aware of his right to object, the court explicitly indicated that it would hear any objections, and petitioner made no objection on the ground of multiplicity, there was clearly an "intentional relinquishment * * * of a known right."

involved an attempt to defraud the revenue. In addition, the district court reviewed the specific underlying facts of the conviction and found that the crime involved dishonesty or a false statement, particularly noting that the failure to file occurred in a context in which petitioner was holding his employees' money as a fiduciary for the government (A. 1068-1072). This finding made evidence of the conviction properly admissible under Rule 609. See *United States* v. *Hayes*, 553 F. 2d 824, 827 n.5 (2d Cir.), cert. denied, 434 U.S. 867 (1977).

3. Finally, petitioner argues (Pet. 20-21) that the prosecutor, on several occasions, asked questions of witnesses that were intended to "paint petitioner as a generally 'bad' person," in violation of the prohibition in Fed. R. Evid. 404(a) against allowing evidence of other acts to show bad character or tendencies toward criminality. Contrary to petitioner's assertion, however, it was not improper for the prosecutor to question a government witness and petitioner about advances from a corporation that were not repaid (A. 908-914). The questioning of the government witness was done on redirect examination only after defense counsel had cross-examined the witness about the practices of the corporation and petitioner in regard to advances. Once petitioner had "opened the door" to this line of inquiry (see A. 910-913), the government properly completed the inquiry for the jury. See *United States* v. *Flinkelstein*, 526 F. 2d 517, 527 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976).[6]

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[6]Cross-examination of petitioner with respect to advances from ABKCO and his failure to submit vouchers for them was likewise proper, for he had testified with respect to the advances on direct examination. See *United States* v. *Benedetto*, 571 F. 2d 1246, 1250 (2d Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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IN THE

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October Term, 1979

No. 79-1342

ALLEN KLEIN

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Allen Klein submits this brief in reply to certain contentions contained in the government's opposing memorandum,[1] and to call to this Court's attention a recent decision of the Court of Appeals for the District of Columbia, in conflict with the decision below (see p. 6 *infra*).

[1] The government's opposing memorandum significantly fails to controvert material portions of the Petition. With respect to Point I, it fails to deny that (i) Klein has effectively been denied his fundamental right to appellate review of his multiplicity objection, overruled by Judge Metzner before the first trial (Pet. pp. 9-10); (ii) the procedure followed by Klein was in compliance with rule 12, Fed.R.Crim.P., which preserves for appeal such pre-trial objection without later renewal (*id.* at p. 10); and (iii) in submitting requests to charge on the multiplicitous counts, and in refraining from remaking the already-denied motion to dismiss, Klein's counsel was adhering to mandatory standards of professional conduct (*id.* at pp. 12-13). Concerning Point II, the government significantly offers no justification for having adduced evidence on the subject of Klein's alleged involvement in bribe payments to customs officials.

I
Concerning The Multiplicity Objection

1. Point I of the Petition raised the important and recurring legal issue, warranting decision by this Court, of whether a defendant must remake a previously-denied motion to dismiss, first made as part of his rule 12 pre-trial motion, in order to preserve his multiplicity objection. Without questioning the significance of this issue, the government, relying on erroneous record assertions, argues that the record does not clearly present this issue. This argument is without basis:

a. The government claims that the second trial judge precluded the issue from arising by stating "that he did not consider the rulings made in the first trial binding upon him" (Gov't Mem. p. 3), thereby giving notice that the law-of-the-case doctrine did not apply. But, in fact, he made no such statement; the appendix pages cited by the government (JA2137-38)[2] show only that he remarked, "I have not intended to go through the transcript of the first trial except as it becomes necessary to decide anything that is before me." Court and counsel were then discussing only *evidentiary* issues, which, as we showed (Pet. p. 11n.3)—without dispute from the government—are beyond the scope of the law-of-the-case doctrine. Klein's pre-retrial memorandum reference to the inapplicability of that doctrine (Gov't Mem. p. 4) was likewise limited to *evidentiary* questions. Indeed, the pages of the pre-retrial hearing immediately following those cited by the government make explicit that the colloquy concerning the second trial court's reconsideration of any previously made decision by the first trial court was limited to evidentiary issues; both the second trial court and the prosecutor expressly stated that they were discussing "evidentiary matters" only (Hearing of Nov. 22, 1978, pp. 14-17).[3] There is, thus, no

[2] Citations bearing the prefix "JA" refer to pages of the Joint Appendix filed in the Court of Appeals.

[3] The prosecutor described the matters then being raised by defense counsel as "evidentiary matter that your Honor should resolve at the time of the trial when your Honor again can see in what context it arises." The court also described the issues as "evidentiary matters" which he would decide when "the matter comes up at trial." The prosecutor concluded by summarizing his position: "[i]f it is an evidentiary issue," the second trial judge should make a determination upon its arising at trial.

suggestion in those pre-retrial proceedings that Klein was required to reassert the motion to dismiss previously determined by the first trial judge.

b. Contrary to the government's conclusory assertion (Gov't Mem. p. 3n.2), count 4 was unambiguously multiplicitious. The government's own brief factual statement (Gov't Mem. p. 2) specifies that "the basis for the false filing count" was Klein's "failure to disclose the receipt of the record proceeds on his personal income tax return"—the very basis of the tax evasion count. From the government's bill of particulars (JA2074-76), furnished before the first pre-trial motions were decided, through the charge to the jury in the second trial, the government has consistently specified that whether Klein received record proceeds was the single determinative issue on both the tax evasion and false filing counts. The second trial court expressly instructed the jury on all counts that "[t]he essential factual issue that is presented is whether Mr. Bennett gave Mr. Klein proceeds from the sale of promotional records" (JA1482, 1489-90, 1503). In fact, as the court acknowledged to counsel before it commenced this charge (JA1312), no further disputed factual issue existed to distinguish between the two sets of counts.

c. Also contrary to the government's assertion (Gov't Mem. p. 3n.3), the first trial court's denial of Klein's rule 12 motion to dismiss was not ambiguous: it was unconditional. The denial did not contain the "without prejudice to renewal" language which a court would certainly insert if it so intended.[4] Moreover, the cases cited in support of the denial do not even implicitly suggest that it was without prejudice to renewal; for example, in one of these cases, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), this Court affirmed the *pre-trial* dismissal of 29 counts of a 32 count indictment on multiplicity grounds, and expressly noted the defendant's right to call upon the government to elect *before trial*. *Id.* at 225. Finally, the

[4] *E.g.*, *United States* v. *Pocono International Corp.*, 378 F. Supp. 1265, 1269 (S.D.N.Y. 1974), which denied a multiplicity motion as possibly "premature" due to the specific facts in that case, but expressly stated that such denial was "without prejudice to renew during the trial."

first trial court's memorandum decision makes clear that it was not based on any factual uncertainty which might be eliminated at trial, but on the erroneous legal premise that the false filing charge was not multiplicitous because it charged "the verification of tax returns under penalty of perjury which he did not believe to be true," whereas the tax evasion counts merely charged "the filing of a false and fraudulent return" (JA2072(52)).

2. Contrary to the government's assertion (Gov't Mem. p. 5n.4), a lesser-included false filing charge would not have been proper had count 4 been dismissed. As this Court stated, "a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses." *Sansone* v. *United States,* 380 U.S. 343, 349-50 (1965). *Accord: United States* v. *Bishop,* 412 U.S. 346, 361 (1973); *Berra* v. *United States,* 351 U.S. 131, 134-35 (1956). Even *Keeble* v. *United States,* 412 U.S. 205, 208 (1973), cited by the government, authorizes a lesser-offense instruction only "if the evidence would permit a jury *rationally* to find [the defendant] guilty of the lesser offense and acquit him of the greater" (emphasis added). Here, as discussed above, the determinative issue was identical in counts 4 and 1, thus precluding any lesser-included offense charge.

3. The government (Gov't Mem. p. 5n.5) distinguishes, as limited to constitutional rights, this Court's prior holdings (Pet. p. 14) that a defendant can be bound by a waiver inferred from his counsel's conduct only if the facts establish an "intentional relinquishment . . . of the known right." But another panel of the court below earlier held that a waiver of a *non*-constitutional right required that identical showing. *Tatum* v. *Cardillo,* 208 F.2d 955 (2d Cir. 1953). In addition, the government's contention raises the important issues of the standard to be applied by lower courts in finding a waiver on the basis of an attorney's conduct, and whether a defendant is entitled to an evidentiary hearing before thus being bound.

II

Concerning The Prosecutor's Adducing Evidence Of Klein's Alleged Immorality And Other Unrelated Misconduct

1. The linch-pin of the government's argument upholding the admissibility of Klein's prior misdemeanor conviction for non-filing of withholding tax returns is the conclusory assertion —without citation of any authority—that it "clearly involved an attempt to defraud the revenue" (Gov't Mem. pp. 5-6).[5] But, as we showed (Pet. pp. 17-18), this conflicts with other decisions, uniformly holding that a non-filing misdemeanor conviction does not require any intent to deceive or defraud. Indeed, the jury in Klein's prior misdemeanor trial was so instructed (JA2110).

The government also relies on "the specific underlying facts of the [prior misdemeanor] conviction" as a basis for finding that it "involved dishonesty or a false statement" within the meaning of rule 609(a)(2), Fed.R.Evid. (Gov't Mem. p. 6). The important and recurring criminal justice issue raised herein, on which there is a conflict among the circuits, is thereby highlighted: should admissibility of a defendant's prior misdemeanor conviction be determined strictly on the elements of the prior conviction or on the underlying facts? Indeed, since

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[5] *United States* v. *Apuzzo,* 555 F.2d 306 (2d Cir. 1977), *cert. denied,* 435 U.S. 916 (1978) and *United States* v. *De Angelis,* 490 F.2d 1004 (2d Cir.), *cert. denied,* 416 U.S. 956 (1974), cited by the government immediately *preceding* this statement (Gov't Mem. p. 5), did not involve non-filing offenses. Those decisions hold only that prior convictions for the affirmative act of smuggling cigarettes not bearing revenue stamps are veracity-related within the scope of 609(a)(2). By refusing to affix revenue stamps (the sole procedure for advising the government of the tax obligation), in addition to smuggling (which leads to the destruction of taxable cigarettes through *sale* and consumption), these defendants not only effectively barred the government from learning about the tax that should be paid, but also defrauded the revenue by avoiding payment of the tax upon purchase. For example, the prior conviction in *Apuzzo* involved a violation of N.J. Stat. Ann. 54:40A-28 (West, 1960), which prohibits sale of unstamped cigarettes [see *State* v. *Oates,* 300 A.2d 865 (N.J. Super. Ct. App. Div. 1973)]; the *De Angelis* trial court described the violation there as "*faking* cigarette tax." Appendix to *United States* v. *De Angelis* at 279 (emphasis added).

the Petition was filed, the Court of Appeals for the District of Columbia Circuit rendered a decision in direct conflict with the government's position and with the decision of the court below. In *United States* v. *Lewis,* No. 79-1275, slip op. (D.C. Cir. March 3, 1980), it held:

> "Contrary to the Government's construction, we do not perceive that it is the manner in which the offense is committed that determines its admissibility. Rather we interpret Rule 609(a)(2) to require that the crime 'involve dishonesty or false statement' as an *element* of the statutory offense" (emphasis added).[6]

2. At trial, the government offered evidence of Klein's misconduct—in receiving advances from ABKCO which he never repaid, vouchered or reported as income—to establish, *inter alia,* Klein's "attitude with respect to the payment of taxes" (JA757), "dishonesty" (JA1469a), and "lack of candor" (JA1393-94, 1469a). It now contends that the evidence was admissible because Klein had "opened the door" by questioning a witness about practices in regard to advances. Klein's questioning, however, concerned the *making* of advances and was relevant to show the availability of cash, thereby countering the government's claim that his source of cash was Bennett's sale of promotional records. That Klein had not subsequently repaid, vouchered or reported these advances as income was irrelevant to the crime charged. As this is a recurring issue in the administration of criminal justice, it is essential that this Court make clear that a defendant, by adducing *relevant* evidence on a given subject, does not open the door to *irrelevant* and *prejudicial* testimony in any way related to that subject. *Cf. United States* v. *Estell,* 539 F.2d 697, 699 (10th Cir.), *cert. denied,* 429 U.S. 982 (1976) (relevant direct questioning on sale of marijuana does not open door to questioning on source of marijuana); *United States* v. *Vigo,* 435 F.2d 1347, 1350-51 (5th Cir. 1970), *cert. denied,* 403 U.S. 908 (1971) (defendant's testimony denying knowledge of anyone convicted of heroin offense who dealt with specified

[6] In so holding, the District of Columbia Circuit has effectively overruled its dicta in *United States* v. *Smith,* 551 F.2d 348, 364n. 28 (D.C. Cir. 1976) and its progeny (discussed in Pet. p. 19), on which both the Second and Seventh Circuits have since based their contrary decisions (also discussed at Pet. p. 19).

individual did not open door to government cross-examination as to whether her husband had been so convicted and was that individual's best friend); *United States* v. *Turcotte,* 515 F.2d 145, 152 (2d Cir.), *cert. denied,* 423 U.S. 1032 (1975) (question as to arrest for cashing race track tickets under a false name held relevant to establishing knowledge of grand jury investigation, but question as to whether arrest resulted in conviction held improper because irrelevant and prejudicial).

Conclusion

The petition for a writ of certiorari should be granted.

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